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SUMMARY

The Commission should deny US WEST's request for a stay of its decision in the Access Charge Reform Order to prohibit incumbent local exchange carriers ("ILECs") from applying the per-minute transport interconnection charge ("TIC") to minutes of use carried on competitors' transport facilities. US WEST has not satisfied any of the stringent criteria required to obtain a stay of the Commission's Order.

First, US WEST has not demonstrated that it is likely to prevail on the merits of its appeal. The Commission rationally decided that the TIC, as currently applied, undermines competition, frustrates the goals of the 1996 Act, and denies the public the benefits of an efficient marketplace. Its decision is clearly not arbitrary and capricious. Second, US WEST has not shown that it would be irreparably harmed in the absence of a stay. US WEST's claims of economic injury are speculative and exaggerated, and in any event it has ample pricing flexibility to stem any customer losses that might result from its inability to apply the TIC to competitors' traffic.

Third, US WEST has clearly failed to demonstrate that no other party would be harmed by a stay. Competitors would be severely harmed if ILECs were permitted to continue to assess the TIC on competitors' transport traffic, thereby inflating the cost of their services, and giving the ILECs a considerable and unfair competitive advantage. Fourth, and finally, US WEST has not demonstrated that the public interest would be served by a stay of the Commission's Order. In fact,

prohibiting the ILECs from assessing the TIC on competitors' traffic would create a more efficient and competitive marketplace, which clearly is in the public interest. Accordingly, the Commission should deny US WEST's request for a stay of its Order.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	CCB/CPD 97-43
Access Charge Reform)	CC Docket No. 96-262

OPPOSITION TO PETITION FOR PARTIAL STAY PENDING JUDICIAL REVIEW

Teleport Communications Group Inc. ("TCG") hereby opposes the "Petition for Partial Stay Pending Judicial Review" ("Petition") of the Commission's Access Charge Reform Order¹ filed by the US WEST, Inc. ("US WEST") on August 14, 1997. US WEST requests a stay of the Commission's decision to prohibit incumbent local exchange carriers ("ILECs") from applying the transport interconnection charge ("TIC") to traffic that does not traverse ILEC transport facilities.² The Commission's decision is rational, consistent with the goals of the Telecommunications Act of 1996 ("1996 Act"), and a well-reasoned response to

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1. Access Charge Reform, First Report and Order, FCC 97-158 (rel. May 16, 1997) ("Access Charge Reform Order" or "Order").
 2. US WEST acknowledges (at n.16) that its Petition "relies on many of the arguments" contained in NYNEX's petition for stay of the Commission's Access Charge Reform Order, dated July 23, 1997. Its Petition therefore suffers from the same infirmities. See Oppositions and Comments filed by TCG, Time Warner Communications Holdings, Inc., MCI Telecommunications Corporation, WorldCom, Inc., and Telecommunications Resellers Association to NYNEX petition for stay, dated August 8, 1997.

the Comptel Order³. US WEST clearly has not satisfied the stringent criteria required to obtain the extraordinary relief it requests, and its Petition should be denied.

I. INTRODUCTION

In the Access Charge Reform Order, the Commission sought to "establish a mechanism that fosters competition and responds to the D.C. Circuit's [Comptel Order] remand" by, *inter alia*, revising its rules governing the TIC rate structure and the application of TIC rates.⁴ The Commission concluded that the TIC, in its present form, did not serve the public interest because "[a]s a per-minute charge assessed on all switched access minutes, including those of competing providers of transport service that interconnect with the LEC switched access network through expanded interconnection, the TIC adversely affects the development of competition in the interstate access market."⁵ The Commission observed that "if the incumbent LEC's transport rates are kept artificially low and the difference is recovered through the TIC, competitors of the incumbent LEC pay some of the incumbent LEC's transport costs."⁶ To remedy this problem, the Commission

3. Competitive Telecommunications Ass'n v. F.C.C., 87 F.3d 522 (D.C. Cir. 1996) ("Comptel Order").

4. Order at ¶ 213. The D.C. Circuit instructed the Commission on remand to develop a cost-based alternative to the RIC [i.e., TIC] or to provide a reasoned explanation for departing from cost-based ratemaking in this instance. Comptel Order, 87 F.3d 522, 536.

5. Id. at ¶ 212.

6. Id. at ¶ 240.

reasonably decided that ILECs should assess the TIC only on switched access minutes that use ILEC transport facilities, and not on any switched minutes transiting competitors' facilities.⁷

The Commission revised its rules governing the application of the TIC and established a more cost-based rate structure in response to the Comptel Order remand.⁸ Thus, the Commission reallocated all tandem-switching revenues from the TIC to the tandem-switching rate element, in approximately three equal steps, beginning January 1, 1998, to encourage the development of "economically-efficient competition" for tandem-switching services.⁹ However, the Commission recognized that some residual TIC costs would still remain after these reallocations were made, and this light it decided to "leave the determination of the ultimate allocation of the remaining costs recovered by the TIC until the conclusion" of the Joint Board proceeding it will be convening.¹⁰

The Commission rejected the claim of some parties that "a portion of the costs recovered by the TIC should be considered to be universal service costs," concluding that "[o]n the basis of the record before us, we cannot clearly associate the remaining TIC revenues with any particular facilities or services."¹¹ It found

7. Id. at ¶ 240.

8. Id. at ¶¶ 217-223.

9. Id. at ¶ 218.

10. Id. at ¶ 225.

11. Id. at ¶ 242.

that "[t]he parties arguing that these costs are related to universal service have not made any clear showing as to the source of these costs or demonstrated why they believe that these TIC revenues are either costs of universal service that should be recovered from the universal service fund or constituent costs of supported services."¹²

It is evident that the Commission's treatment of the TIC issue was rational and logically related to its goal of promoting a more economically efficient marketplace. The Commission clearly made reasonable decisions, supported by the record, in reallocating certain residual TIC costs to other access elements, agreeing to study the need for additional allocations, and in eliminating the unfair advantage that US WEST and other ILECs have enjoyed by applying the TIC to competitors' traffic. In seeking a stay of the Commission's Order, US WEST would perpetuate that unfair economic advantage and require the Commission to ignore the Comptel Order. The Commission should reject this challenge to its Order. It must conclude that US WEST has utterly failed to satisfy the criteria for obtaining a stay.

12. Id.

II. US WEST HAS NOT SATISFIED THE REQUIREMENTS FOR OBTAINING A STAY OF THE COMMISSION'S ORDER

It is well-established that "[o]n a motion for stay, it is the movant's obligation to justify the . . . exercise of such an extraordinary remedy." Cuomo v. United States Nuclear Regulatory Comm'n, 772 F. 2d 972, 978 (D.C. Cir. 1985). Such relief "should be granted only in limited circumstances." Frank's GMC Truck Center, Inc. v. General Motors Corp., 847 F.2d 100, 102 (3d Cir. 1988). In order to obtain a stay of the Commission's Order, US WEST must show that: (1) it is likely to prevail on the merits of its appeal to the court; (2) it will suffer irreparable harm absent a stay; (3) others will not be harmed by grant of a stay; and (4) the public interest supports grant of a stay. Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958), modified, Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977) ("Holiday Tours"). Each of these criteria must be met to support the extraordinary relief of a stay, WWOR-TV, Inc., 6 FCC Rcd 193, 205 (1990); Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd 5384, 5385 (1989), but US WEST has not met any of them.

First, US WEST does not demonstrate that it will succeed on the merits of its appeal. The Commission's decision to deny ILECs the ability to use the TIC as an anticompetitive instrument is well-reasoned and consistent with the goals of the 1996 Act. Second, US WEST does not show that it will suffer irreparable harm if it were precluded from imposing the TIC on traffic that does not use its local

transport facilities. Third, US WEST fails to establish that no other parties will be injured by the grant of a stay. The Commission correctly found that TCG and other competitors will be significantly injured if US WEST were permitted to continue to assess the TIC on their transport traffic. Fourth, US WEST fails to show that the public interest would be served by a stay. As the Commission concluded, prohibiting ILECs from assessing the TIC on competitors' transport would promote competition and thereby serve the public interest in a more efficient and competitive marketplace. Since US WEST has failed to sustain its substantial burden with regard to any of the four critical prongs of a stay, its request must be denied.

A. US WEST Is Not Likely To Prevail On The Merits

In order to obtain a stay, US WEST must make "a strong showing that it is likely to prevail on the merits of its appeal [since] [w]ithout such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review." Virginia Petroleum Jobbers, 259 F.2d at 925. US WEST has made no such showing.¹³

First, US WEST claims that the Commission's decision is not rationally related to its goal of ensuring that CAPs are not charged for local transport when they do not use such services. To the contrary, the Commission's decision precisely achieves that goal. The Commission noted that "if the incumbent LEC's

13. Petition at 7-10.

transport rates are kept artificially low and the difference is recovered through the TIC, competitors of the incumbent LEC pay some of the incumbent LEC's transport costs."¹⁴ For that reason, the Commission reasonably decided that its current TIC policy must be changed since it "requires competitive entrants to pay the TIC even in cases where it provides its own transport," which is "inconsistent with the procompetitive goals of the 1996 Act."¹⁵

US WEST is also wrong in contending that the Commission was arbitrary and capricious in not requiring competitors to pay for the recovery of universal service costs through the TIC, and that the Commission's decision thus violated Section 254(b)(5) of the Act. Notwithstanding that US WEST may have submitted evidence alleging that the TIC recovered universal service costs, the Commission's decision was soundly based on its finding that the parties to the proceeding made no "clear showing" that TIC revenues reflect the costs of universal service.¹⁶ Given this finding, the Order obviously is not arbitrary nor violates Section 254(b)(5) of the Act. US WEST is also simply mistaken in arguing that the Commission's decision regarding the application of the TIC is inconsistent with its finding that additional costs of rural transport are recovered through the TIC. The

14. Order at ¶ 240.

15. Id. The Commission should also dismiss US WEST's quarrel with its decision to refer the ultimate allocation of residual TIC costs to the rulemaking proceeding it will be conducting. This procedural approach is a perfectly reasonable way to resolve a complex issue, and it preserves US WEST's right to make its case regarding the proper method for reallocating and recovering its alleged TIC costs. Id. at ¶ 225.

16. Id. at ¶ 242.

Commission appropriately provided for the recovery of those rural transport costs.¹⁷

Second, US WEST wrongly claims that the Commission's decision arbitrarily discriminates against US WEST by giving its transport competitors a pricing advantage. In fact, the intent of the Commission's decision is to help level the playing field by denying US WEST and other ILECs the unfair competitive advantage they have enjoyed by compelling their competitors to subsidize their local transport rates.¹⁸

Third, US WEST erroneously argues that the Commission's decision is inconsistent with the Order to the extent it denies ILECs the ability to recover their costs through the TIC.¹⁹ This argument is simply a rephrasing of US WEST's other failed challenges to the Order. The Commission reallocated those TIC costs that could clearly be assigned to other access elements, and it agreed to convene a rulemaking to consider the "ultimate allocation of the remaining costs recovered by

17. The Commission finding referenced by US WEST involved the observation that some residual TIC costs resulted from the rates for direct-trunked transport and for the transmission component of tandem-switched transport not recovering the full cost of providing transport in higher cost rural areas. It reasoned that since none of the other facilities-based elements reflected that cost differential, the additional costs of rural transport were presumably recovered through the TIC. The Commission concluded that the record did not allow it to quantify those cost differentials, but it nonetheless required the ILECs to reallocate additional TIC amounts to transport rates to reflect the higher costs of serving lower density areas. Id. at ¶¶ 225-27.

18. See Order at ¶ 240.

19. Petition at 10.

the TIC."²⁰ In that proceeding, US WEST will have an opportunity to make its case regarding the need to reallocate any additional residual TIC costs.

Furthermore, the Commission's decision to prohibit ILECs from assessing the TIC on traffic carried by competitors was entirely consistent with the mandate of the Comptel Order to establish more cost-based access rates and with the procompetitive intent of the 1996 Act.²¹

In sum, the Commission's TIC rule is rational, well-considered, and clearly not arbitrary and capricious, as US WEST contends. US WEST therefore has failed to demonstrate a likelihood that it would prevail on the merits of its appeal of the Commission's decision.

B. US WEST Will Not Suffer Irreparable Harm In The Absence Of A Stay

To establish irreparable harm, a petitioner must show a strong likelihood that the injury will occur: "the injury must be both certain and great; it must be actual and not theoretical. . . . [T]he party seeking injunctive relief must show that '[t]he injury complained of [is] of such imminence that there is "clear and present" need for equitable relief to prevent irreparable harm.'" Wisconsin Gas Co. v. Federal Energy Regulatory Comm'n, 758 F.2d 669, 674 (D.C. Cir. 1985) (quoting Ashland Oil Inc. v. FTC, 409 F. Supp. 297, 307 (D.D.C.), aff'd, 548 F.2d 977 (D.C. Cir. 1976) (emphasis in original)). A petitioner must show more than the potential for economic injury resulting from the loss of revenues. See, e.g., Iowa Util. Bd. v.

20. Order at ¶ 225.

21. Id. at ¶¶ 240, 243.

F.C.C., 109 F.3d 418, 426 (8th Cir. 1996). Indeed, "[i]t is . . . well settled that economic loss does not, in and of itself, constitute irreparable harm." Wisconsin Gas, 758 F. 2d 669, 674. A petitioner instead must show, in effect, that the viability of its very business would be placed in jeopardy. See Holiday Tours, 559 F.2d 841, 843 and n.2.

US WEST has clearly failed to demonstrate that it would be irreparably harmed in the absence of a stay. It merely presents speculative and disingenuous claims of potential economic losses allegedly resulting from customers shifting to CAP transport services.²² In fact, US WEST has more than adequate pricing flexibility to stem any customer losses; it can offer attractive pricing packages to customers, including volume, term, and geographic discounts. Moreover, US WEST faces no competitive threat whatsoever at the hundreds of offices where there are no collocation arrangements in existence. In any event, even if US WEST prevailed in its appeal, the Commission on remand could revise its TIC rule in a manner that addresses US WEST's economic concerns and allows it to recover any competitive losses. Since the Commission could take these remedial steps, there is no need for it to issue a stay.

In this light, US WEST obviously has not shown that its alleged injury will be "certain and great. . . actual and not theoretical," Wisconsin Gas, 758 F.2d 669, 674, nor shown that the viability of its business will be jeopardized. Holiday

22. See Petition at 10-13.

Tours, supra. US WEST therefore has not demonstrated that it will suffer irreparable harm in the absence of a stay.

C. Competitors Will Be Harmed If The Commission Stays Its Order

US WEST's assertion that a stay would not harm other parties is clearly without merit.²³ It argues that after January 1, 1998, the TIC will not contain any costs of providing local transport and therefore it will not have any advantage in the local transport market if the current TIC rule were retained pending its appeal. However, the reallocation of TIC costs to other access elements will not be undertaken on a flash-cut basis, but will occur over a three year period, and during that period the Commission properly decided that it would be anticompetitive for the ILECs to apply the TIC to CAP transport.²⁴

The Commission succinctly explained how competitors are directly and severely harmed by the TIC, observing that "[t]he TIC, as currently structured, provides the incumbent LECs with a competitive advantage for some of their interstate switched access services because the charges for those services do not recover their full costs. At the same time, the incumbent LECs' competitors using expanded interconnection must pay a share of incumbent LEC transport costs through the TIC. . . . [Consequently,] the TIC adversely affects the development of competition in the interstate market."²⁵ Staying the Commission's Order would

23. Id. at 13-14.

24. See Order at ¶¶ 217-223.

25. Id. at ¶ 212.

only perpetuate the unreasonable competitive advantage that US WEST and other ILECs have enjoyed and therefore would harm significantly their competitors.

D. The Issuance Of A Stay Is Not In The Public Interest

The final prong of the test to determine whether to issue a stay requires an evaluation of what effect a stay would have on the public interest. US WEST claims that a stay of the Commission's Order would preserve what it claims is the current "fair competition" that exists in local transport. It also argues that a stay would allow it to recover universal service support through the TIC, until the Commission develops a system of explicit support.²⁶ In fact, the Commission reasonably decided that the current form of the TIC is the antithesis of "fair competition" because it "adversely affects the development of competition in the interstate access market."²⁷ Furthermore, as explained above, the Commission properly rejected US WEST's claim that the TIC reflects any universal service support costs.²⁸

Prohibiting ILECs from applying the TIC to competitors' transport will indeed serve the public interest for it will lead to lower transport rates, end the artificial and unfair subsidies the ILECs' transport services have enjoyed, and afford customers the benefits of more even-handed competition, thereby helping to realize

26. Petition at 14-15.

27. Order at ¶ 212.

28. Id. at ¶ 242.

the procompetitive goals of the 1996 Act.²⁹ Consequently, a stay of the Commission's Order clearly would not be in the public interest.

III. CONCLUSION

For the reasons stated above, the Commission should deny US WEST's request for a stay of the Commission's Order.

Respectfully submitted,

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29. Id. at ¶ 240.

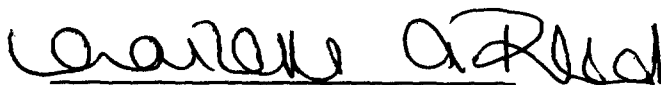
CERTIFICATE OF SERVICE

I, Charlene A. Reed, do hereby certify that on this 10th day of September, 1997, I have caused a copy of the foregoing OPPOSITION TO PETITION FOR PARTIAL STAY to be served via hand delivery, upon the persons listed below:

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Federal Communications
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A handwritten signature in black ink, appearing to read "Charlene A. Reed", is written over a horizontal line.

Charlene A. Reed